Metreco Industries Sdn Bhd v Muhammad Fadhil bin Ab Wahid and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02(IM)(NCVC)-143–01 OF 2018 AND B-02(IM)(NCVC)-396–02 OF 2018
NALLINI PATHMANATHAN, BADARIAH SAHAMID AND ZABARIAH YUSOF JJCA
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Civil Procedure — Res judicata — Cause of action estoppel — Plaintiff's suit for trespass against sole defendant struck out on latter's application — Plaintiff thereafter sued same defendant together with three others in fresh suit based on same cause of action and facts which premised struck-out suit — Whether plaintiff estopped from bringing new suit against same defendant on same issues/cause of action

The appeals herein were against the High Court's decision to allow the respondents to strike out the appellant's action against them. In the action ('the 2017 suit'), the respondents, Muhammad Fadhil bin Ab Wahid ('D3') and Lee Wai Soon ('D2'), were sued along with two others for trespassing upon the appellant's land and unlawfully extracting sand therefrom. The facts and cause of action upon which the 2017 suit was based were the same ones the appellant had relied upon when it sued D3 alone in a separate action two years earlier ('the 2015 suit'). On D3's application, the court struck out the 2015 suit. The appellant did not appeal against the decision but filed the 2017 suit after the defendants therein had pleaded guilty in the sessions court to Penal Code charges of trespassing upon the appellant's land and stealing sand therefrom. D3 applied to strike out the 2017 suit, arguing that the appellant was clearly barred by res judicata from raising the same issues and cause of action that it had raised in the 2015 suit against him. D2 filed a similar application and relied not only upon res judicata but also the ground that the appellant's statement of claim did not disclose a reasonable cause of action against him and that the action was scandalous, frivolous, vexatious and an abuse of process of court. In allowing both the applications, the High Court held that, inter alia, as far as D2 was concerned, the appellant should have sued D2 in the 2015 suit after it became aware that he was charged in the sessions court with committing the alleged trespass. Another factor which influenced the court's decision was the appellant's evidence in the sessions court proceedings that only D3 was responsible for its loss and not D2.

Held, dismissing Appeal No 143 against the decision on D3's striking-out application; allowing Appeal No 396 against the decision on D2's striking-out

application and ordering the suit against D2 to proceed to trial:

(1) The 2017 suit against D3 was clearly barred by res judicata. The High Court did not err in allowing the application to strike out the suit. The factual matrices were the same in both the 2017 and the 2015 suits, the cause of action was the same and the parties were the same, namely, the appellant and D3. The appellant was estopped from bringing a similar cause of action on the same subject-matter against D3 (see paras 35–36 & 44).

(2) The appellant's argument that the order striking out the 2015 suit was not a final one had no merit. That decision was based on the same subject-matter and issues and was binding on the court at a later stage in the same suit or in a subsequent suit. An issue that was already determined either expressly or by necessary implication could not be raised by parties a second time in a subsequent suit (see paras 37–39).

(3) The fact that the 2017 suit involved other defendants was not a ground to say that it was for that reason different from the 2015 suit. The principle of res judicata was not affected by the absence of the other parties in the 2015 suit. The fact that there were different parties in the 2017 suit did not disentitle D3 from invoking the doctrine of res judicata to bar the appellant from re-litigating a specific issue that had been litigated earlier (see para 40).

(4) D3's plea of guilty to the charges under ss 379 and 447 of the Penal Code in the sessions court (which was a year after the 2015 suit had been struck out) could not be a basis to override the principle of res judicata. The appellant's failure to appeal against the order striking out the 2015 suit and instead filing the 2017 suit against D3 based on the same sets of facts and issues was: (a) a concession that the High Court's striking out of the 2015 suit was correct; and (b) an abuse of process of court in deliberately attempting to circumvent the necessary appeal procedure (see paras 42–43).

(5) D2's striking-out application on the basis that there was no reasonable cause of action could not be sustained given that the appellant's cause of action was that the defendants had trespassed on its property and extracted sand therefrom (see para 46).

(6) It was not clear whether res judicata applied in D2's case since, unlike D3, he was only sued in the 2017 suit. D2's pleading that his involvement in the trespass was premised upon the representation by the other defendants that they had authority to enter onto the appellant's land, was an issue that needed to be tried. A trial was also required to determine the identity of the persons who committed the trespass and whether or not they were D2's employees. The appellant could not be denied of its day in court to prove that D2 had committed the trespass. No prejudice would

be caused if the suit against D2 went for trial. It was open to D2 to raise the defence of res judicata again at the trial but the appellant would suffer serious prejudice and grave injustice if its suit was struck out at this stage. So long as there was a cause of action and there were disputed issues, the case ought to go for trial no matter how weak the case might be (see paras 49–52).

[Bahasa Malaysia summary

Rayuan-rayuan ini adalah terhadap keputusan Mahkamah Tinggi untuk membenarkan responden-responden membatalkan tindakan perayu terhadap mereka. Dalam tindakan tersebut ('guaman 2017'), responden-responden, Muhammad Fadhil bin Ab Wahid ('D3') dan Lee Wai Soon ('D2'), telah disaman bersama dua orang lain kerana menceroboh tanah perayu dan menyalahi undang-undang mengekstrak pasir dari tanah tersebut. Fakta dan kausa tindakan yang mana guaman 2017 didasari adalah sama dengan yang perayu bergantung kepada apabila ia menyaman D3 sahaja dalam tindakan berasingan dua tahun sebelumnya ('guaman 2015'). Dalam permohonan D3, mahkamah telah membatalkan guaman 2015. Perayu tidak merayu terhadap keputusan itu tetapi telah memfailkan guaman 2017 selepas defendan-defendan mengaku bersalah di mahkamah sesyen terhadap pertuduhan-pertuduhan pencerobohan Kanun Keseksaan ke atas tanah perayu dan mencuri pasir darinya. D3 memohon untuk membatalkan guaman 2017, dengan berhujah bahawa perayu jelas dihalang oleh res judicata daripada menimbulkan isu dan kausa tindakan sama yang telah ditimbulkan olehnya dalam guaman 2015 terhadapnya. D2 telah memfailkan permohonan sama dan bergantung bukan sahaja kepada res judicata tetapi juga alasan bahawa penyataan tuntutan perayu tidak menunjukkan kausa tindakan munasabah terhadapnya dan bahawa tindakan itu adalah bersifat skandal, remeh, menyusahkan dan suatu penyalahgunaan proses mahkamah. Dalam membenarkan kedua-dua permohonan itu, Mahkamah Tinggi berpendapat bahawa, antara lain, setakat yang D2 adalah berkaitan, perayu sepatutnya menuntut D2 dalam guaman 2015 selepas ia menyedari bahawa dia didakwa di mahkamah sesyen kerana melakukan kesalahan pelanggaran itu. Satu lagi faktor yang mempengaruhi keputusan mahkamah ialah keterangan perayu dalam prosiding mahkamah sesyen bahawa hanya D3 yang bertanggungjawab atas kerugiannya dan bukannya D2.

Diputuskan, menolak Rayuan No 143 terhadap keputusan berhubung permohonan pembatalan D3; membenarkan Rayuan No 396 terhadap keputusan berhubung permohonan D2 dan memerintahkan guaman terhadap D2 untuk meneruskan dengan perbicaraan:

(1) Guaman 2017 terhadap D3 jelas dilarang oleh res judicata. Mahkamah Tinggi tidak khilaf apabila membenarkan permohonan itu membatalkan guaman tersebut. Matriks faktual adalah sama dalam kedua-dua guaman

2017 dan guaman 2015, kausa tindakan adalah sama dan pihak-pihak adalah sama, iaitu, perayu dan D3. Perayu telah diestop daripada memulakan tindakan sama berhubung perkara sama terhadap D3 (lihat perenggan 35–36 & 44).

(2) Hujahan perayu bahawa perintah pembatalan guaman 2015 itu bukanlah yang terakhir tidak mempunyai merit. Keputusan itu berdasarkan hal perkara dan isu yang sama dan mengikat mahkamah pada peringkat berikutnya dalam guaman yang sama atau dalam guaman berikutnya. Suatu isu yang telah ditentukan sama ada secara nyata atau dengan implikasi yang perlu tidak boleh ditimbulkan oleh pihak-pihak untuk kali kedua dalam saman berikutnya (lihat perenggan 37–39).

(3) Hakikat bahawa guaman 2017 melibatkan defendan lain bukanlah alasan untuk mengatakan bahawa ia adalah untuk sebab itu berbeza daripada guaman 2015. Prinsip res judicata tidak terjejas oleh ketiadaan pihak lain dalam guaman 2015. Hakikat bahawa ada pihak yang berlainan dalam guaman 2017 tidak menyangkal D3 daripada mengajukan doktrin res judicata untuk menghalang perayu daripada menundukkan semula isu khusus yang telah dilucutkan sebelumnya (lihat perenggan 40).

(4) Pengakuan bersalah D3 atas pertuduhan-pertuduhan di bawah ss 379 dan 447 Kanun Keseksaan di mahkamah sesyen (iaitu satu tahun selepas guaman 2015 telah dibatalkan) tidak boleh menjadi asas untuk mengatasi prinsip res judicata. Kegagalan perayu untuk merayu terhadap perintah yang membatalkan guaman 2015 dan sebaliknya memfailkan guaman 2017 terhadap D3 berdasarkan set fakta dan isu yang sama adalah: (a) suatu konsesi bahawa Mahkamah Tinggi yang membatal guaman 2015 adalah betul; dan (b) penyalahgunaan proses mahkamah dengan sengaja cuba mengelakkan prosedur rayuan yang diperlukan (lihat perenggan 42–43).

(5) Permohonan pembatalan D2 atas alasan tiada kausa tindakan yang munasabah tidak dapat dikekalkan memandangkan kausa tindakan perayu adalah bahawa defendan telah menceroboh hartanahnya dan mengeluarkan pasir darinya (lihat perenggan 46).

(6) Ia tidak jelas sama ada res judicata terpakai dalam kes D2 oleh kerana, tidak seperti D3, dia hanya disaman dalam guaman 2017. Pli D2 bahawa penglibatannya dalam pencerobohan itu adalah berdasarkan perwakilan oleh defendan-defendan lain yang mereka mempunyai kuasa untuk memasuki tanah perayu, adalah satu isu yang perlu dibicarakan. Perbicaraan juga perlu untuk menentukan identiti orang yang melakukan pencerobhan itu dan sama ada atau tidak mereka adalah pekerja D2. Perayu tidak dapat dinafikan peluangnya di mahkamah untuk membuktikan bahawa D2 telah melakukan kesalahan itu. Tiada

prasangka yang akan berlaku sekiranya guaman terhadap D2 dibicarakan. Ia terbuka kepada D2 untuk menibulkan pembelaan res judicata sekali lagi semasa perbicaraan tetapi perayu akan mengalami prasangka yang serius dan ketidakadilan yang serius jika guamannya dibatalkan pada peringkat ini. Selagi terdapat kausa tindakan dan terdapat isu-isu yang dipertikaikan, kes itu perlu dibicarakan tidak kira betapa lemahnya kes tersebut (lihat perenggan 49–52).]

Notes

For cases on cause of action estoppel, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 8355–8336.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd [2016] 3 MLJ 122, CA (refd)

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57; [1997] 2 CLJ 104, CA (refd)

Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd [2011] 6 MLJ 788, CA (refd)

Lim Oh & Ors v Allen & Gledhill [2001] 3 MLJ 481, FC (refd)

Manoharan a/l Malayalam v Menteri Dalam Negeri, Malaysia & Anor [2009] 2 MLJ 660, FC (refd)

Scott & English (M) Sdn Bhd v Yung Chen Wood Industries Sdn Bhd [2018] 5 MLJ 204; [2018] 6 CLJ 271, FC (refd)

Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd [2013] 5 MLJ 1, FC (refd)

Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1, FC (refd)

Sim Kie Chon v Superintendent of Pudu Prison & Ors [1985] 2 MLJ 385; [1985] CLJ Rep 293, SC (refd)

Wong Yoon Yar v Lin Yin Thai & Ors [1987] 2 MLJ 714, SC (refd)

Legislation referred to

Penal Code ss 34, 379, 447
Rules of Court 2012 O 18 r 19(1), (1)(a)

Appeal from: Suit No BA-22NCVC-454–07 of 2017 (High Court, Shah Alam)

Normaslina Abdul Fuad (Mohd Azzamauddin Shah Yaakup with her) (BH Gan,

Nor & Kim) Civil Appeal Nos B-02(IM)(NCVC)-143–01 of 2018 and B-02(IM)(NCVC)-396–02 of 2018 for the appellant.

Nur Sazila Abd Halim (Iza Ng Yeoh & Kit) in Civil Appeal No B-02(IM)(NCVC)-143–01 of 2018 for the respondent.

Hasmaliza Othman (Fairuz Adiba & Partners) in Civil Appeal No B-02(IM)(NCVC)-396–02 of 2018 for the respondent.

Zabariah Yusof JCA:

[1] There are two related appeals by the appellant (the plaintiff in the court below) against the decision of the learned High Court judge which allowed striking out applications by the respondents (the second and third defendants in the court below), namely:

(a) Appeal B-02(IM) (NCVC)-143–01 of 2018 ('Appeal 143'); and

(b) Appeal B-02(IM) (NCVC)-396–02 of 2018 ('Appeal 396').

[2] Appeal 143 is in respect of the decision of the learned High Court judge on the third defendant's striking out application, whilst Appeal 396 is in respect of the decision of the learned High Court judge on the second defendant's striking out application. Both appeals originated from a single suit in the High Court, namely BA-22NCVC-454 of 2017, wherein the second and the third defendants filed separate applications to strike out the plaintiff's writ and statement of claim.

[3] Having perused the appeal records and having considered the submissions of both parties, unanimously, we allowed Appeal 396 with costs of RM10,000 here and below to be paid to the appellant subject to allocator and dismissed Appeal 143 with costs of RM10,000 to be paid to the respondent here and below subject to allocator. We ordered the matter in Appeal 396 to proceed with full trial in the High Court. Herein below are our reasons for deciding so.

[4] Parties will be referred to as they were in the High Court.

BACKGROUND

[5] The plaintiff, Metreco Industries Sdn Bhd, owns a property known as Lot PT 36842, HSD 20256, at Mukim Dengkil, Daerah Sepang, Selangor ('the land').

[6] The third defendant is the sole proprietor of Sri Gumut Enterprise.

[7] It is the plaintiff's case that it discovered some excavation works being

carried out on the land and there were lorries and machineries on the land. There was a signboard erected on the adjacent plot of land beside the land of the plaintiff which named the third defendant as the contractor responsible for the clearing of the land.

The first suit

[8] As a result, on 12 November 2015, the plaintiff instituted a suit against the third defendant, namely Shah Alam High Court Suit 22NCVC-80–02 of 2015 ('the first suit') for trespass on the land.

[9] In this first suit, the third defendant was the sole defendant. And it was pleaded by the plaintiff in its statement of claim that:

(a) on or about January 2015, the plaintiff discovered that the third defendant, either by himself or through his workers, servants or agents and without the plaintiff's knowledge/consent, had trespassed into the land. It was also alleged that the third defendant, without the plaintiff's consent/knowledge had carried out digging work and removed sand out from the said land (paras 4–5 of the statement of claim);

(b) as a result, the plaintiff suffered losses arising from the removal/extraction of sand and alleged that the third defendant's conduct has caused depreciation in the market value of the land. The plaintiff sought to be compensated for the losses suffered (para 7 of the statement of claim); and

(c) there was at the material time a notice board and fence made of zinc plates erected on the land, however the notice board was erected on the land beside the plaintiff's land. The notice board contains the Selangor state emblem with the following words:

> Kerja-Kerja Mencuci Tanah Dan Tapak Semaian Bagi Tujuan Perladangan Dengan Kerjasama Kerajaan Negeri Selangor di kawasan Puchong, Daerah Dengkil, Selangor;
>
> Kontraktor: Sri Gumut Enterprise (00993472-X)
>
> No 15B, Jalan Pelabur B 23B, Seksyen 23,
>
> 40300 Shah Alam
>
> Selangor

(para 10 of the statement of claim).

[10] Paragraph 11 of the statement of claim further states:

> Defendan iaitu kontraktor yang dinamakan di dalam papan tanda tersebut secara sendiri atau melalui pekerja, pengkhidmat, ejennya atau sebaliknya telah

A menceroboh, menyalahi undang-undang tanah, tidak berkuasa atau tidak berhak untuk membuat kerja-kerja cadangan sedemikian di atas Tanah lot milik Plaintif.

[11] The third defendant filed a striking out application in the first suit premised on the following grounds:

B

(a) the plaintiff lodged a police report on 28 January 2015, naming other individuals, namely Kenneth and Fairus, as the persons who committed trespass on the land. The third defendant was never mentioned in the police report as a person who was involved in the trespass;

C

(b) four persons were charged for trespass and theft of sand in the Sepang sessions court where two of them pleaded guilty to trespass whilst two other persons (of which the third defendant was one of them) claimed trial;

D

(c) the signboard which named the third defendant as contractor was erected on the adjacent plot of land (Lot PT 036841) which belongs to Plenitude Permai Sdn Bhd;

(d) the lorries and machineries on the plaintiff's land did not belong to the third defendant; and

E

(e) there was no material facts pleaded by the plaintiff in the statement of claim to show that the plaintiff has a cause of action in trespass against the third defendant or that it was the third defendant who committed the offence of theft of sand from the plaintiff's land.

F

[12] It was averred by the third defendant in the striking out application in the first suit, that the suit by the plaintiff against the third defendant was premised on the notice board which was erected on the land beside the plaintiff's land, which named the third defendant as the contractor responsible

G for clearing works on the land.

[13] The striking out application by the third defendant was allowed by the learned High Court judge and the plaintiff's statement of claim was effectively struck out on 5 August 2015. The plaintiff did not file any appeal against the

H 5 August 2015 decision. The second defendant had no knowledge of the first suit.

The second suit

I **[14]** On 28 July 2017, the plaintiff filed another suit, BA-22NCVC-454 of 2017 (the second suit) against several defendants, including the second and third defendants, premised on the same cause of action. This is the suit which the present two appeals originated from. In this second suit, the plaintiff pleaded in its statement of claim as follows:

(a) on 19 January 2015 the plaintiff found out that unidentified personnel, which was later identified as the fourth defendant, has without the plaintiff's consent and/or permission, trespassed into the land (paras 7–8 of the statement of claim);

(b) the plaintiff found out that there were machineries used for land digging and sand extraction activities on the said land (para 10 of the statement of claim);

(c) on 4 February 2015, the plaintiff found out that:

(i) the land was fenced up by zinc plates and was placed between the border of the land and Lot PT 036841 owned by Plenitude Permai Sdn Bhd:

(1) the entrance gate to the land has been locked;

(2) a notice board was erected at the entrance of the land which has the Selangor state emblem with the following words:

> Kerja-Kerja Mencuci Tanah Dan Tapak Semaian Bagi Tujuan Perladangan Dengan Kerjasama Kerajaan Negeri Selangor di kawasan Puchong Daerah Dengkil, Selangor;
>
> Kontraktor: Sri Gumut Enterprise (00993472-X) No 15B, Jalan Pelabur B 23B, Seksyen 23, 40300 Shah Alam Selangor
>
> No 15B, Jalan Pelabur B 23B, Seksyen 23,
>
> 40300 Shah Alam
>
> Selangor

(3) a police report was lodged by the plaintiff and a representative of the owner of Lot PT 036841;

(4) Sri Gumut Enterprise is the contractor named on the said notice board and the third defendant is the sole proprietor stated therein (para 15 of the statement of claim);

(5) the alleged trespass and the alleged extraction of sand caused the plaintiff to suffer losses due to depreciation in value of the land and costs incurred to repair and restore the condition of the said land;

(6) the plaintiff sought, as its relief, a declaration that the defendants, jointly and severally, whether by themselves or through employees and agents, had committed trespass on the plaintiff's land and orders for general damages, compensatory damages, aggravated and exemplary damages, interest and costs;

(7) on or about March 2015, the first, second, third and fourth defendants were charged jointly on 23 March 2015 at the Sepang sessions court on two charges, namely under:

(A) s 379 read together with s 34 of the Penal Code for the

offence of theft of sand belonging to the plaintiff; and
(B) s 477 read together with s 34 of the Penal Code for the offence of trespass committed between 19 January–18 March 2015 on the land;

(d) the first and the second defendants pleaded guilty and were sentenced. Whereas the third and the fourth defendants claimed trial and the trial proceeded on 27 June–17 August 2016. However on 30 July 2016, the third and the fourth defendants pleaded guilty and were sentenced accordingly.

[15] In the second suit, the second and third defendants filed separate striking out applications which were heard by different High Court judges on different dates.

[16] The third defendant premised his striking out application on the basis that the second suit arose from the same cause of action as per the first suit. The third defendant's main contention is that since the first suit was struck out and there has been no appeal against that decision, the plaintiff is barred by res judicata from filing the second suit. On 18 December 2017, the High Court allowed the striking out application by the third defendant and held that the second suit is caught by the principle of res judicata.

[17] The second defendant premised his striking out application on grounds of no reasonable cause of action, res judicata and that the plaintiff's claim was scandalous, frivolous, vexatious and abuse of court process. The second defendant's striking out application was allowed on 7 February 2018.

[18] The plaintiff appealed against both decisions of the High Court, which are the appeals before us.

FINDINGS OF THE HIGH COURT

Against the second defendant

[19] The learned High Court judge found that the plaintiff had admitted that the second suit against the second defendant is premised on the same factual matrix and the same cause of action as the first suit. Vide the affidavit filed by Lim Chin Tong, director of the plaintiff dated 15 January 2018, at para 5, the plaintiff admitted that when he filed the first action, the plaintiff did not have any evidence nor proof of the second defendant's involvement in the trespass. The only evidence the plaintiff had, was based on the information derived from the notice board erected on the land beside the plaintiff's land. The relevant paragraph of the affidavit reads:

5. Oleh yang demikian, saya mengatakan bahawa pada waktu yang material, kecuali

melalui keterangan papan cadangan tersebut, Plaintiff memang tidak mempunyai sebarang keterangan atau bukti mengenai penglibatan Defendan Kedua (Lee Wai Soon) atau sesiapa lain, sebagai pekerja, pengkhidmat atau ejen Defendan Ketiga. Lagipun, Defendan Ketiga didalam guaman Tuntutan Pertama menafikan langsung penglibatan dirinya samada secara sendiri atau melalui pekerja, pengkhidmat atau agennya dan telah memplid satu bentuk pembelaan sahaja terhadap tuntutan Plaintiff iaitu pada dasarnya 'Defendan sama sekali tidak pernah, samada atau sebaliknya menceroboh mana-mana tanah milik Plaintiff dan melakukan kerja-kerja seperti mana yang didakwa Plaintiff ...'.

[20] The plaintiff had also admitted that at the time of filing the first suit, he had no claim against the second defendant (para 11 of the grounds of judgment).

[21] It is the finding of the learned High Court judge that the plaintiff should have filed the claim against the second defendant earlier in the first suit. The learned High Court judge was of the view that the plaintiff knew of the seconds defendant's involvement at least by the time the second defendant was brought to the Sepang criminal sessions court on 23 March 2015. Given that the first suit was struck out on 5 August 2015, the plaintiff had at least five months to include the second defendant as a party to the first action but he failed to do so.

[22] The learned High Court judge viewed the reason as to why the plaintiff did not include the second defendant nor claimed for any compensation against the second defendant in the first suit was because his losses were caused by the third defendant and not by the second defendant. His Lordship arrived at these findings premised on the evidence given by the plaintiff at the Sepang criminal sessions court where the plaintiff admitted that his loss was caused by the third defendant and/or Sri Gumut only. The relevant para 12 of the grounds reads:

12 ... Melalui afidavit sokongan defendan kedua yang diikrarkan pada 3 Januari 2018 dan merujuk kepada eksh 'D6', adalah didapati bahawa plaintif hanya membawa tuntutan kerugian terhadap defendan ketiga sahaja melalui guaman pertama tersebut dan tiada tuntutan pampasan lanjutan terhadap defendan kedua, memandangkan kerugian yang dialami oleh plaintif hanya disebabkan oleh defendan ketiga sahaja. Dalam keadaan yang sedemikian, adakah tindakan plaintif ini merupakan suatu tindakan berdasarkan kepada princip res judicata? ...

D6 is the notes of proceedings of the criminal sessions court.

[23] After referring to the Federal Court case of *Manoharan a/l Malayalam v Menteri Dalam Negeri, Malaysia & Anor* [2009] 2 MLJ 660, the learned High Court judge found that based on the principle of res judicata, since the court in the first suit had dismissed the claim premised on the same issues and claim, the

second defendant's application to strike out the second action should be allowed.

[24] The plaintiff submitted that the first suit involved different parties from the second suit and that the decision in the first suit was not a final decision but a decision on an interlocutory application. The learned High Court judge found no merits in such arguments. As a result the application by the second defendant to strike out the plaintiff's claim was allowed by the High Court.

Against the third defendant

[25] The learned High Court judge found that the cause of action in the first and the second suits are the same. The plaintiff did not appeal against the decision in the first suit. Therefore the second suit is caught by res judicata.

[26] Similarly, as in the striking out application by the second defendant, the plaintiff raised the issue that the first suit involved different parties as opposed to the second suit and that the decision in the first suit was not a final decision but a decision on an interlocutory application. The reasons given by the third defendant to strike out the claim against him are not procedural in nature.

[27] The learned High Court judge found that the order which struck out the plaintiff's first suit against the third defendant is a final order. By naming the other defendants in the second suit, the plaintiff cannot avoid the applicability of the doctrine of res judicata. Therefore the High Court allowed the third defendant's application to strike out the writ and the statement of claim.

GROUNDS OF APPEAL BY THE PLAINTIFF

[28] The plaintiff's memorandum of appeal raised the following as grounds of appeal:

(a) the second suit is not a plain and obvious case to be struck out;

(b) the principle of res judicata is not applicable;

(c) the learned High Court judge had taken irrelevant considerations when deciding on the application to strike out the writ and statement of claim under O 18 r 19(1)(a) of the ROC 2012;

(d) the plaintiff has a right to have the matter adjudicated at full trial to explain the factual matrix of their claim, inter alia:

(i) what the plaintiff meant by its admission that it has no evidence against the second defendant;

(ii) why was the second defendant not named as a defendant in the first action;

(iii) what the plaintiff's witness meant in his evidence in the Sepang sessions criminal court; and

(iv) why did the plaintiff not appeal against the first action's decision.

OUR DECISION

[29] It is trite law that a court in exercising its power of striking out suits under any of the limbs under O 18 r 19(1) of the ROC 2012 will only invoke the summary process in plain and obvious cases, where the claim is obviously unsustainable on the face of it. The burden to prove that it is plain and obviously unsustainable on the face of it, rests with the defendants. The court will not conduct a minute examination of the documents and facts of the case to decide whether the party has a cause of action or defence. The fact that the case is weak and not likely to succeed is not a ground to strike out the case. So long as the pleadings disclose some cause of action or raised some issues fit to be tried, it is enough to sustain the case for trial, and it ought not be struck out (refer to *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 385; [1985] CLJ Rep 293).

[30] The main issue for our determination in these appeals is whether the second suit against the second and the third defendants is barred by res judicata. The parties referred to the Supreme Court decision in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 and affirmed by a later decision by the Federal Court in *Scott & English (M) Sdn Bhd v Yung Chen Wood Industries Sdn Bhd* [2018] 5 MLJ 204; [2018] 6 CLJ 271. The plaintiff referred to the Court of Appeal decision of *Letchumanan a/l Gopal (representative for the estate of Rajammah a/p Muthusamy, deceased) v Pacific Orient & Co Sdn Bhd* [2011] 6 MLJ 788, where it had been held that the doctrine of res judicata is applicable although the parties are different (also refer to the Court of Appeal decision in *Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd* [2016] 3 MLJ 122).

[31] It is not in dispute that both the first suit and the second suit are in respect of the same cause of action involving the same subject matter, namely, trespass on the land belonging to the plaintiff. The relief prayed for is also for the alleged loss as a result of the alleged trespass of the land attributable to the extraction of sand in both the first and the second suits. The learned High Court judge made the same findings that both the first and the second suits involve the very same issues arising from the same factual matrix. In fact the plaintiff in item 2 of its memorandum of appeal admitted that both the suits

involved the same cause of action and/or the same facts.

As against the third defendant

[32] The third defendant premised his striking out application on the basis that the second action arises from the same cause of action as per the first action, namely the second action is barred by res judicata.

[33] We agree with the submission of the plaintiff above as far as the third defendant is concerned. The facts pleaded in the statement of claim in the first suit and the second suit as against the third defendant are the same. The cause of action is the same, namely trespass to the land. However, the plaintiff submitted that the relief prayed for in the first suit and the second suit is different in that, the remedy sought for in the first suit was for an injunctive relief against the trespass on the land, which according to the plaintiff was never determined in the first suit. Whilst the second suit was for a declaration that the act of trespass was committed.

[34] We found the arguments of the plaintiff have no merits as the relief for an injunction as sought for in the first action is already academic as the plaintiff had withdrawn the application for the injunction. This is evidenced by the order dated 30 April 2015 (at p 142 of RA 143).

[35] In any event (in respect of the second suit against the third defendant), it is also trite law that even though, as alleged by the plaintiff that the reliefs sought in the first suit is purportedly different from the second suit, res judicata still bites, as the factual matrices are the same, the cause of action is the same and the parties are the same namely the plaintiff and the third defendant. Res judicata also applies to issues or facts which are part of the subject matter of litigation which might have been and which were not brought forward, though not actually decided by the court. The relief prayed for, is premised on the same cause of action of trespass to the same land. The declaration sought in the second suit could have been brought up earlier in the first suit. This cannot be made clearer than what had been held in *Asia Commercial Finance (M) Bhd* whereby the Supreme Court held in its judgment at p 197:

> ... When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata proveritate accipitur*. The public policy of the law is that it is in the public interest that there should be finality in litigation — *interest rei publicae ut sit finis litium*. It is only just no one ought to be vexed twice for the same cause of action — *nemo debet bis vexari pro eadem causa* ...

Page 198 of the same case reads:

The starting point ought to be the celebrated passage by Wigram VC in the case of *Henderson v Henderson* [1843] 3 Hare 100 at p 115 which is:

> The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time.

At p 200 of the judgment:

> ... It is further necessary at this stage to understand the import of the words in the said famous statement ie '... every point which properly belonged to the subject of litigation ...'. Which Somervell LJ explained in *Greenhalgh v Mallard* [1947] 2 All ER 255 at p 257 as follows:
>
> > ... res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

Wigram VC referred to 'points' which according to Peh Swee Chin SCJ in *Asia Commercial Finance (M) Bhd* means the 'points should actually include causes of action, or all causes of action which one of the two parties has against the other, based on, or substantially on the same facts or issues, and not just all issues of law or of fact that are in dispute between the parties'.

[36] It is clear that premised upon the principle as enunciated in the aforesaid cases, the plaintiff is estopped from bringing a similar cause of action on the same subject matter against the third defendant.

[37] The plaintiff alleged that the order dated 5 August 2015 is not a final order as it is a decision based on an interlocutory proceedings and that there has been a serious misdirection by the learned High Court judge. In this respect, we refer to the case of *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57; [1997] 2 CLJ 104 where the Court of Appeal in its judgment addressed this issue of whether a decision made on an interlocutory proceedings is a final order. The court was of the view that it does not matter whether the order in question was final or interlocutory and that the principle contended for applied to both types of orders:

> [1] The learned judge was faced with an objection as to the form of proceedings which had been adopted by the appellants. He came to the conclusion that the form chosen by the appellants was not irregular. *Although that was a decision made on an interlocutory matter which was purely procedural in nature, it was, nevertheless, binding on the court and on all parties to the lis until its reversal on appeal.* Consequently, the decision of the learned judge in overruling the respondent's preliminary objection had rendered the point taken res judicata.

A [2] It cannot be over-emphasised that once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be re-opened willy-nilly. Certainty and finality are the two pillars on which the judicial process rests.

B At p 65 (MLJ); p 113 (CLJ) of the case, the Court of Appeal in its judgment stated:

If authority is needed for the proposition which has commended itself to us, it is to be found in *Government of Malaysia v Dato' Chong Kok Lim* [1973] 2 MLJ 74 which was drawn to the attention of counsel during argument and in which there appears the following passage in the judgment of Sharma J (at p 76):

C In *Satyadhyan Ghosel and orthers v Sint Deorajin Dobi & Another* AIR [1960] SC 941, the statement of the law on the subject is given thus:

> The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter — whether on a question of fact or a question of law — has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in s 11 of the Code of Civil Procedure; but even where s 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.

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The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.

G *A decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit (see Peareth v Marriot* [1883] 22 ChD 182*, ... Parties cannot raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication (see Louis Dreyfus v Aruna Chalayya* LR 58 IA. (Emphasis added.)

H Further in the case of *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1 the Federal Court held that:

I [3] Once a regularly obtained order or judgment had been perfected, the court was functus officio. The matter, as decided vide encl 6, was thus res judicata and could not be re-litigated. The order made under encl 6 was appealed and affirmed right up to the Federal Court. It could not now be revisited or re-asserted under any guise in a subsequent proceeding. The issues raised by the respondent in encl 29 could have been brought up during the appeal process. The law does not allow the respondent to have a second bite of the cherry and in the manner as it did.

> [4] The relitigation of a regularly and properly concluded matter as determined by the court is prohibited by the wide doctrine of res judicata. The judicial process rests on the twin pillars of certainty and finality. A final order or a judgment must therefore be vigorously protected by this doctrine.

[38] The decision given by the learned High Court judge in the first suit was based on the same subject matter and issue is binding on the court at a later stage in the same suit or in the second subsequent suit. An issue that has already been determined either expressly or by necessary implication cannot be raised by parties a second time in a subsequent suit.

[39] Therefore, the plaintiff's argument that the order dated 5 August 2015 was not a final order has no merits.

[40] The fact that the second suit involves other defendants is not a basis to say that the second suit against the third defendant is different from the first suit. Regardless, the principle of res judicata is not affected by the absence of the other parties in the first suit. What is clear is that the second suit without doubt, involves the same facts, the fact that the parties are different from the first suit does not disentitle the third defendant from invoking the doctrine of issue estoppel to bar the plaintiff from relitigating a specific issue that had been litigated in the first suit. Here, the third defendant was a party in the first suit and also a party in the second suit, except that he is being sued with other defendants. The doctrine seeks to prevent abuse of the process of court by attempting to take a second bite of the cherry by relitigating the same issues and reliefs based on the same subject matter for which judgment had been given.

[41] The plaintiff seeks to distinguish the first suit and the second suit by stating that the capacity in which the third defendant was sued was different in that the first suit was brought through himself and/or his agent trading under the name and style of 'Sri Gumut Enterprise', is misleading the court. The third defendant is the sole proprietor of Sri Gumut Enterprise and not a separate entity that was sued in his individual capacity. In any event, the third defendant was sued in his individual capacity in the first suit and also in the second suit. The third defendant retains the same liabilities as if he is the sole proprietor. In the case of *Wong Yoon Yar v Lin Yin Thai & Ors* [1987] 2 MLJ 714 where the court held that:

> The same situation applies to a sole proprietor. He may not wish to carry on business in his own name but prefer to choose something more colourful or meaningful to bring luck and prosperity to his business. So, he chooses a 'chop' name and trades under that. But he does not by so doing create an entity separate from himself. He retains just the same liabilities and obligations in regard to his business ...

[42] Another issue raised is the fact that the third defendant pleaded guilty on the charges under ss 379 and 447 in the Sepang sessions court on 26 July 2016 which was one year after the decision on 5 August 2015. We are of the view that the plea in the Sepang sessions court cannot be a basis to override the principle of res judicata.

[43] It is to be noted that there has been no appeal by the plaintiff against the decision of the High Court dated 5 August 2015, but instead the plaintiff chose to file the second suit against the third defendant premised on the same set of facts and same issues. We view this as:

(a) a concession that the decision of the learned judge in the first suit was correct and therefore the plaintiff would be precluded from canvassing the same argument in the second suit; and

(b) a deliberate attempt to circumvent the necessary appeal procedure and therefore amounts to an abuse of court process.

(refer to the Federal Court case of *Lim Oh & Ors v Allen & Gledhill* [2001] 3 MLJ 481).

[44] Therefore, with regards to the third defendant, inevitably the second suit filed by the plaintiff is caught by the principle of res judicata and hence the learned High Court judge did not err when he allowed the application of striking out of the second action by the third defendant.

As against the second defendant

[45] The second defendant premised his striking out application on the grounds of no reasonable cause of action, res judicata and that the plaintiff's claim was scandalous, frivolous and vexatious and an abuse of court process.

[46] On whether the plaintiff has a reasonable cause of action, premised on the pleadings, it is clear that the plaintiff's cause of action is trespass to property where it was alleged that the defendants had encroached on the property and extracted sand therefrom. Therefore this basis of striking out cannot hold.

[47] The main issue is whether the second suit is caught by res judicata.

[48] The learned High Court judge had referred to and applied the averments in para 5 of the affidavit in reply by the plaintiff which was affirmed on 15 January 2018, to make a finding that the plaintiff has no basis to institute a claim against the second defendant. The relevant paragraph of the said affidavit in reply is reproduced here when the plaintiff states:

> Oleh yang demikian, saya mengatakan bahawa pada waktu material, kecuali melalui keterangan papan cadangan tersebut, plaintif memang tidak mempunyai sebarang keterangan atau bukti mengenai penglibatan Defendan Kedua (Lee Wai Soon atau sesiapa lain sebagai pekerja, perkhidmatan atau agennya ...

(Refer to *RRT* at pp 15–16.)

[49] However, the learned High Court judge failed to consider the averment of the third defendant in the first suit where he states:

> Begitu juga dengan pekerja seramai enam orang tersebut, selain tiada sebarang pengetahuan mengenainya, defendan tidak pernah menggajikan mana-mana individu untuk membuat perbuatan kelakuan menceroboh tanah milik plaintif.

Since the third defendant had denied that the six individuals/workers who were allegedly carrying the act of trespass on plaintiff's land were his employees/workers, then the question arose as to who are these individuals. These are matters that should be sent for trial of the second suit for the determination of who are these individuals, whether they were employed by the second defendant. The second defendant was not named in the first suit as the plaintiff did not have any idea of the involvement of the second defendant then. It was held by the learned judge that the plaintiff could have included the second defendant, five months before the first suit was struck out as the second defendant had pleaded guilty on trespass in the criminal sessions court.

However, we are of the view that the plea of guilt by the second defendant in the Sepang sessions court and the pleadings by the second defendant in his amended statement of defence that his involvement in the trespass is premised upon the representation of the other defendants that they have the authority to enter onto the land, are issues that need to go for trial. This was never an issue in the first suit as the first suit only concerned the third defendant. The second defendant was never in the picture when the first suit was filed. In fact from the pleadings in the first suit, the plaintiff did not know of the existence of the second defendant at that point in time.

[50] At this stage, as far as the second suit against the second defendant is concerned, it is not clear whether res judicata applies unlike the situation as against the third defendant. The second defendant was not sued in the first suit unlike the third defendant, who was sued in both the suits. Hence, we are of the view that, the second suit against the second defendant should go for trial.

[51] Whether the plaintiff would succeed in his claim against the second defendant is not the concern of the court at this stage. The plaintiff must be given his day in court to prove that the trespass was/was not committed by the second defendant and/or the other defendants (excluding the third defendant).

[52] The second defendant is not precluded from raising and arguing the defence of res judicata again at the trial. There will be no prejudice to parties, if the matter is to proceed with full trial. However, the plaintiff would be seriously prejudiced, if the matter is to be struck out at this stage, as the plaintiff would be deprived of the opportunity to prove his case. This would cause grave injustice to the plaintiff. We are minded of the position in law that the doctrine of res judicata was 'designed to achieve justice, a court should decline to apply it, if its application would lead to an unjust result' (refer to *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1). It is also to be borne in mind that this is a striking out application by the second defendant. All the plaintiff needs to show is that there are issues fit for trial, which we found that there are. So long that there is a cause of action and there are disputed issues, the case ought to go for trial, no matter how weak the case may be. The plaintiff should be given his day in court against the second defendant.

CONCLUSION

[53] Therefore premised on the aforementioned reasons, we found that Appeal 143 is caught by res judicata. With respect to Appeal 396, it is not clear to us that it is caught by res judicata. There will be no prejudice if the suit against the second defendant is to go for trial. Appeal 143 is dismissed with costs and Appeal 396 is allowed with costs.

Appeal allowed; High Court's decision and order for sale set aside.

Reported by Ashok Kumar